No. 01-1578

Supreme Court, U.S.
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In The
Supreme Court of the United States

MEDICAL ASSURANCE OF WEST VIRGINIA, INC.,
Petitioner,

v.

EVANGELINE C. PIZARRO, M.D.; COLUMBO AND STUHR, P.L.L.C.,
Respondents,

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS FOR WEST VIRGINIA

BRIEF IN OPPOSITION OF RESPONDENT EVANGELINE C. PIZARRO, M.D.

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STATEMENT OF THE CASE

This brief in opposition to Medical Assurance Inc.'s Petition for a Writ of Certiorari is submitted on behalf of the Respondent, Evangeline C. Pizarro, M.D. The following Factual Backdrop and Procedural History include additional facts or clarifications of the statements contained in the Petition for Writ of Certiorari.

I. Factual Backdrop

The Plaintiff, Evangeline C. Pizarro, M.D., resides in Ohio County, West Virginia. The Defendant, Medical Assurance of West Virginia, Inc. (hereinafter "Medical Assurance") issued a medical professional liability policy to Dr. Pizarro on January 7, 1998 by mailing a copy of such policy to the Doctor at her offices at 2115 Chapline Street, Wheeling, West Virginia.

On July 9, 1998, counsel for Delores and Ralph Young served a notice by certified mail upon Dr. Pizarro at her Wheeling offices and advised the Doctor that the Youngs may bring a medical professional liability action against her relating to medical professional services rendered to Delores Young. Dr. Pizarro immediately forwarded said notice to Medical Assurance.

On December 30, 1998 Delores and Ralph Young filed a medical malpractice action against Dr. Pizarro, and others, in the Court of Common Pleas of Belmont County, Ohio (hereinafter "the underlying action"). The action against Dr. Pizarro was premised upon her alleged failure to diagnose Mrs. Young's rectal cancer which resulted in the development of multiple tumors in her rectum and an eventual surgery for the establishment of a permanent colostomy.

Following the institution of suit, Medical Assurance retained the services of the Morgantown, West Virginia law firm of Colombo and Stuhr, P.L.L.C.; and William A. Davis,

Esq., a member of said firm, was assigned to represent the interests of Dr. Pizarro.

During the course of her deposition in the underlying action, Dr. Pizarro admitted to deviating from appropriate standards of care in a number of respects. Specifically, Dr. Pizarro acknowledged that she deviated from the standard of care in not ordering screening tests for colorectal cancer during the two years before Mrs. Young's initial hemoccult study. She also admitted that she failed to discuss family history with Mrs. Young following the results of the first hemoccult test and that she did not perform a digital rectal examination after obtaining the results of the hemoccult test.

Shortly after giving her deposition in the underlying action, Dr. Pizarro requested Attorney Davis to take steps to resolve the case within policy limits in order to avoid exposure to an excess verdict and the stress associated with having her family's assets jeopardized by a jury trial.

Further, Medical Assurance was advised by Dr. Pizarro's defense counsel that, based on their evaluation, the case would be difficult to defend; and it was the recommendation of both defense counsel and the local claims department that Medical Assurance grant settlement authority.

During an August 11, 2000 settlement conference, the Young's counsel proposed settlement at the $875,000 level. At this time a co-defendant, Dr. Lavapies, settled out of the case for $250,000. Medical Assurance's offer of $10,000 on behalf of Dr. Pizarro was, not surprisingly, rejected. Later, defense counsel reiterated the recommendation that the action be settled within policy limits, however, despite its awareness that the case presented a high risk defense and that the case could be settled for $300,000, Medical Assurance pressed the case to trial.

Because Dr. Pizarro did not want to be the only defendant left in the case at trial, she again requested

defense counsel to take such steps as may be necessary to have her insurer resolve the underlying action within policy limits. The request, however, was to no avail as the action against Dr. Pizarro proceeded to trial; and on August 25, 2000, following four days of trial by jury, a verdict for compensatory damages totaling $7,500,000 was entered against Dr. Pizarro and her co-defendant (the clinic where she provided medical services). The trial court gave the defendants credit for the $250,000 settlement made with Dr. Lavapies and entered a Judgment on Verdict in favor of Delores Young and against Dr. Pizarro and the clinic in the amount of $4,833,333.33 together with post-judgment interests at the rate of 10% per annum from August 25, 2000 until paid and granted judgment on the loss of consortium claim in favor of the Plaintiff, Ralph Young, against Dr. Pizarro and her co-defendant in the amount of $2,416,666.67 along with post-judgment interest upon the same terms.

Following the verdict, the trial court denied Dr. Pizarro's motion for a new trial and all of the other substantive post-verdict motions filed on her behalf. The trial court also granted the defendant clinic's motion for a directed verdict on its cross claim for indemnification against Dr. Pizarro, thereby leaving Dr. Pizarro responsible for the entire judgment.

Further, after determining that Dr. Pizarro's representatives failed to make a good faith effort to settle the case, the trial court granted the Young's motion for pre-judgment interest as provided for at *Ohio Revised Code* 1343.03(C). The pre-judgment interest resulting from Medical Assurance's failure to make a good faith effort to settle the claim on behalf of Dr. Pizarro added another $818,420 to the $7,250,000 judgment. Post-judgment interest has also been running since the date of judgment at the rate of 10% per annum. Hence, Medical Assurance's insistence to try the underlying case resulted in Dr. Pizarro being found liable for damages to the Youngs in an amount in

excess of $8,000,000; and such damages are continuing to accumulate at a rate in excess of $67,000 per month.

Following the entry of this staggering verdict, Dr. Pizarro retained separate counsel to represent her personal interests. Despite said counsels' request for Medical Assurance to acknowledge its responsibility to indemnify Dr. Pizarro for the excess judgment arising out of its failure to reasonably resolve the underlying action within policy limits, Medical Assurance refused to indemnify Dr. Pizarro for any sum in excess of the $1,000,000 of coverage afforded under her policy.

Although Medical Assurance prosecuted an appeal in the underlying action, (and such appeal remains pending) the verdict which was returned against Dr. Pizarro had a devastating effect upon the doctor and her family. Indeed, subsequent to the entry of the excess verdict, Dr. Pizarro retired from the practice of medicine.

II. Procedural History

Following Medical Assurance's refusal to indemnify its insured from the excess judgment which was entered against her, Dr. Pizarro instituted proceedings against Medical Assurance and the attorneys which it retained on her behalf in the Circuit Court of Ohio County, West Virginia. (Civil Action No. 00-C-1489(G)). The action against Medical Assurance is premised upon principles of common law and statutory insurance bad faith. In *Shamlin v. Nationwide Mut. Ins. Co.*, 396 S.E.2d 766 (WV 1990) the West Virginia Supreme Court of Appeals held that an insurer may be liable to an insured for an excess judgment entered against the insured in an underlying personal injury suit where the insurer, in bad faith, fails to settle a claim within policy limits. Under *Shamlin*, "whenever there is a failure on the part of the insurer to settle within policy limits where there exists the opportunity to settle and where such settlement within policy limits would release the insured

from all personal liability," there exists a *prima facie* case of bad faith. Id. at 776. Upon the establishment of a *prima facie* case, the burden shifts to the insurer to prove by clear and convincing evidence: (1) that it attempted in good faith to negotiate a settlement, (2) that the failure to enter into a settlement where the opportunity to do so existed was based on reasonable and substantial grounds, and (3) that it accorded the interests and rights of the insured at least as great a respect as its own. Id. at 776.

Because Medical Assurance failed to settle the underlying action within policy limits when there existed an opportunity to so settle and such settlement would have released Dr. Pizarro from any and all personal liability, Dr. Pizarro's *prima facie* case of bad faith under *Shamlin* is apparent.

In addition to her *Shamlin* claim, Dr. Pizarro has also alleged that Medical Assurance's failure to settle the underlying action under the circumstances described above was violative of the West Virginia Unfair Trade Practices Act as provided for at *W.Va.Code* 33-11-1 et.seq.

The amended complaint also sets forth a claim for attorney malpractice against the attorneys retained by Medical Assurance on behalf of Dr. Pizarro. Here, Dr. Pizarro contends that in a case where an insured requests settlement and expresses concern about the exposure of personal assets to an excess verdict, her counsel has a duty to take appropriate steps to protect the client's personal assets from being jeopardized by an insurer bent on placing its own financial interests above those of its insured.

Following the institution of proceedings in circuit court, Medical Assurance filed a motion to dismiss whereby it asserted, *inter alia*, that the trial court lacked subject matter jurisdiction over Dr. Pizarro's action against it by virtue of an arbitration provision in Dr. Pizarro's medical professional liability policy.

After permitting the parties to conduct discovery regarding the arbitration question and considering the

memoranda of law submitted by the parties, oral argument upon the motion and other pertinent legal authorities, the trial court denied Medical Assurance's motion to dismiss for lack of subject matter jurisdiction by order entered on August 16, 2001 (see: Petition for Writ of Certiorari at App. 3).

Thereafter, Medical Assurance brought an original proceeding seeking a writ of prohibition before the Supreme Court of Appeals of West Virginia based on its assertion that the circuit court abused its power and exceeded its authority by denying its motion to dismiss.

Upon receipt of Medical Assurance's petition, the West Virginia Supreme Court of Appeals requested a response to the petition from Dr. Pizarro and following consideration of the petition and Dr. Pizarro's response, the West Virginia high court refused the petition by order under date of January 23, 2002.

In a surprising turn of events, by correspondence under date of March 12, 2002, counsel for Medical Assurance advised counsel for Dr. Pizarro that Medical Assurance was willing to indemnify Dr. Pizarro for any and all damages or other relief awarded against her with respect to the August 25, 2000 jury verdict entered in the underlying action. Thereafter, Dr. Pizarro filed a motion for partial summary judgment.

Based upon Medical Assurance's agreement to indemnify Dr. Pizarro, the circuit court found that Dr. Pizarro had accomplished the primary objective of her *Shamlin* action and entered an order adjudging that Dr. Pizarro had prevailed with regard to her action for bad faith against Medical Assurance designed to relieve her of any personal liability for any judgment ultimately rendered against her in the underlying action irrespective of the liability limitation contained in the subject medical professional liability policy. See: Order, Appendix 1.

Because Medical Assurance's agreement to indemnify Dr. Pizarro did not permit the circuit court to

fully adjudicate the action under Rule 56 of the West Virginia Rules of Civil Procedure, the circuit court has retained jurisdiction to consider issues arising under Dr. Pizarro's claim under West Virginia's Unfair Trade Practices Act, the amount of reasonable attorney's fees to which Dr. Pizarro is entitled for vindicating her *Shamlin* claim, and other questions relating to the extent and nature of the damages to which Dr. Pizarro may be entitled for the claims made against Medical Assurance. See: Order, Appendix 1. Hence, these limited issues involving Medical Assurance remain pending in the West Virginia circuit court.

Medical Assurance contends that the issue before this Court is whether the West Virginia court may, on public policy grounds, refuse to enforce an arbitration clause that is otherwise enforceable under the FAA. Because, however, the circuit court's decision in this matter was not premised solely upon principles of public policy and because the Supreme Court of Appeals of West Virginia considered several legal arguments challenging the enforceability of the subject arbitration clause in addition to the public policy issue, the "question presented" by Medical Assurance incompletely and inaccurately characterizes the scope of the issues presented to and considered by the West Virginia courts.

ARGUMENT

I. Dr. Pizarro's Common Law and Statutory Bad Faith Claims Do Not Fall Within The Purview Of The Arbitration Clause.

In denying Medical Assurance's motion to dismiss based on lack of subject matter jurisdiction, the circuit court found that Dr. Pizarro's common law and statutory bad faith claims were not barred by the insurance policy's arbitration provision.

As discussed above, the amended complaint set forth a first party *Shamlin* action and a statutory bad faith claim against Medical Assurance. Importantly, the amended

complaint neither states a claim for breach of contract nor alleges that Medical Assurance breached any provision of the subject insurance policy issued to Dr. Pizarro.

Because arbitration provisions are contractual in nature, construction of such provisions and the contracts in which they appear is a matter of contract interpretation. See: *Seaboard Coast Line R.R. v. Trailer Train Co.*, 690 F.2d 1343, 1352 (11th Cir. 1982). The question of whether an arbitration clause requires arbitration of a particular dispute therefore "rests on the intent of the parties." *Seaboard*, 690 F.2d at 1348. A corollary of this rule is that no party may be forced to submit a dispute to arbitration that the party did not intend and agree to arbitrate. *Seaboard*, 690 F.2d at 1352 (holding that the federal policy favoring arbitration "cannot serve to stretch a contract beyond the scope originally intended by the parties"). See also: *Tracer Research Corp. v. National Envtl. Servs. Co.*, 42 F.3d 1292, 1294 (9th Cir. 1994). The principle that a party cannot be required to submit to arbitration any dispute which he has not contractually agreed to submit is also well accepted in West Virginia. *International Paper Co. v. Schwabedissen, Maschinen and Anlageng GMBH*, 206 F.3d 411 (C.A. 4, W.Va. 2000), *Marrow Bone Development Co. v. District 17, United Mine Workers of America*, 147 F.3d 296 (C.A. 4, W.Va. 1998).

While Dr. Pizarro does not dispute that parties to an agreement may waive adjudication in favor of arbitration, a party may be compelled to arbitrate only those issues to which the parties have agreed. Because the arbitration clause at issue in this case does not demonstrate Dr. Pizarro's waiver of her right to adjudicate the common law and statutory remedies available to her in West Virginia, the clause is inadequate to compel the arbitration of her action for bad faith.

In interpreting arbitration clauses which include claims or controversies "arising out of" a particular contract, courts have found such clauses to be narrow in scope; i.e., the scope of the arbitration clause is limited to those claims

having some direct relation to the terms and provisions of the contract. See: *Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983); *Enray Kinoshaita & Co.*, 287 F.2d 951, 953 (2nd Cir. 1961). Both the *Mediterranean* and *Kinoshaita* courts found that claims which did not rely on the interpretation or performance of the contract containing the arbitration clause are not subject to arbitration as disputes "arising out of" the contract.

While adding the phrase "relating to" the phrase "arising out of" has been construed as broadening the scope of the arbitration provision see: *American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 93 (4th Cir. 1996), even in contracts containing broad arbitration provisions, the determination of whether a specific dispute is required to be submitted to arbitration necessarily depends on the existence of some nexus between the dispute and the contract containing the arbitration clause.

The mere fact that a tort action would not have arisen "but for" the existence of the contract and consequent relationship between the parties has been found to be insufficient to transform such action into a dispute "arising out of or relating to" the contract. See: *Armanda Coal Export, Inc. v. Interbulk, Ltd.*, 726 F.2d 1566, 1568 (11th Cir. 1984); *Hersman, Inc. v. Fleming Co., Inc.*, 19 F.Supp.2d 1282, 1287 (M.D. Ala. 1998), *aff'd.* 180 F.3d 271 (11th Cir. 1999). Hence, in order for an action in tort to be considered "arising out of or relating to" an agreement, such action should, at a minimum, raise some issue which requires reference to or construction of some portion of the contract to resolve. See: *Hersman*, 19 F.Supp. 2d at 1286-87. In *Dusold v. Porta-John Corp.*, 807 P.2d 526, 530 (Ct. App. 1990) the court ruled that:

> "in order for the dispute to be characterized as arising out of or related to the subject matter of the contract, and thus subject to arbitration, it must, at the very least, raise some issue the resolution of which requires

> reference to or construction of the contract itself. Further, the relationship between the dispute and the contract is not satisfied simply because the dispute would not have arisen absent the existence of the contract between the parties." Id. at 529.

Under the analytical framework established in *Dusold*, in cases where:

> "the duty alleged to be breached is one imposed by law in recognition of public policy and is generally owed to others besides the contracting parties, then a dispute regarding such a breach is not one arising from the contact, but sounds in tort. Therefore, a contractually-imposed arbitration requirement...would not apply to such a claim." *Dusold* at 529.

In applying these principles to the action *sub judice*, the West Virginia circuit court noted that Dr. Pizarro's action against Medical Assurance is predicated upon theories of common law and statutory insurance bad faith (see: Petition for Writ of Certiorari at App. 4). Indeed, the action is wholly unrelated to any rights, obligations, or duties arising under any specific policy of insurance; and instead, arises out of and relates to general duties owed by insurers to their insureds under law in West Virginia.

In finding that a bad faith action was not barred by an insurance policy's arbitration provision, the Supreme Court of Nevada in *Pulley v. Preferred Risk Mut. Ins. Co.*, 897 P.2d 1101 (Nev. 1995) held that "the duty to act in good faith does not arise from the terms of an insurance contract, but rather, the duty of good faith and fair dealing is imposed by law, and the violation of this duty is a tort. Id. at Syl. Pt. 5. *Pulley* is consistent with the holding *Wilt v. State Auto Mut.*

Ins. Co., 203 W.Va. 165, 506 S.E.2d 608 (1998) where the West Virginia Supreme Court of Appeals made it clear that an action against an insurer for unfair claim settlement practices sounds in tort, not in contract. Id. at Syl. Pt. 2.

In West Virginia it has also been recognized that an insurer has an "overarching duty" to deal with its insured fairly and in good faith. *Kronjaeger v. Buckeye Union Ins. Co.*, 200 W.Va. 570, 490 S.E.2d 657 (1997) at Syl. Pt. 13. Such "overarching duty" does not arise out of and relate to any specific policy of insurance, but rather relates to common law and statutory duties which transcend contractural obligations.

Dr. Pizarro's bad faith claim against Medical Assurance is based upon her contention that Medical Assurance failed to settle the underlying action when there existed an opportunity to settle and when such settlement would have released its insured from any and all personal liability. Dr. Pizarro further contends that Medical Assurance's failure to enter into such settlement where the opportunity to do so existed was not based upon reasonable and substantial grounds, and that Medical Assurance failed to accord the interests and rights of Dr. Pizarro at least as great a respect as its own. This action arises out of Medical Assurance's breach of its duty to deal fairly and in good faith with its insured by reasonably resolving the underlying action when the opportunity to do so existed and its decision to place its own financial interests above those of its insured. It is the alleged breach of common law and statutory duties imposed upon Medical Assurance under law in West Virginia that form the basis of Dr. Pizarro's action, not its breach of any duty or obligation arising under the subject insurance policy. The action against Medical Assurance raises no issue which requires reference to or construction of the policy to resolve. Therefore, the action cannot fairly be said to arise out of or relate to the policy for purposes of enforcing the arbitration clause.

Hence, the West Virginia circuit court's finding that Dr. Pizarro's common law and statutory bad faith claims did not fall within the purview of the subject arbitration clause was neither an abuse of its power nor an act in excess of its authority; and the West Virginia high court correctly found that prohibition did not lie under *W.Va. Code*, 53-1-1.

II. An Arbitration Clause In An Insurance Policy Does Not Bar Dr. Pizarro's Action Under The West Virginia Unfair Trade Practices Act.

In addition to finding that Dr. Pizarro's common law and statutory bad faith claims are not within reach of the subject arbitration provision, the West Virginia circuit court also denied Medical Assurance's motion to dismiss for lack of subject matter jurisdiction on the basis that it is against public policy for an insurance company to insert an arbitration provision into an insurance policy which eviscerates a policyholder's statutorily created rights. Here, the West Virginia circuit court noted that:

> "In West Virginia, an insured has a private cause of action against her insurer for breach of its general legal duty to deal fairly and in good faith in settling claims against her. See: *W.Va.Code* 33-11-4(9)(2000). This Court believes that Dr. Pizarro's statutory right to sue Medical Assurance for breach of its legal duty would effectively be defeated if the arbitration provision controlled this dispute." *Cf. Wheeling-Pittsburgh Steel Corp. v. Rowing*, 517 S.E.2d 763 (W.Va. 1999); *Copley v. NCR Corp.*, 394 S.E.2d 751 (W.Va. 1990). (see: Petition for Writ of Certiorari at App. 5).

In *Copley v. NCR Corp.*, 183 W.Va. 152, 394 S.E.2d 751 (1990) the West Virginia Supreme Court of Appeals considered the enforceability of an arbitration provision

which would have extinguished an employees right to bring an action for a human rights violation under *W.Va.Code*, 5-11-13(b). The question in *Copley* was whether the right to bring a statutory civil action for a human rights violation could be extinguished by an arbitration clause in an employment contract. After noting that a majority of the federal courts of appeals have concluded that even where an employee is subject to the Federal Arbitration Act, the contractual obligation to submit to arbitration cannot override or defeat a civil rights claim, the *Copley* court concluded that "under West Virginia law, an arbitration clause in an employment contract cannot defeat a human rights action filed by the claimant pursuant to *W.Va.Code*, 5-11-13(b)." *Copley* at Syl. Pt. 2.

Dr. Pizarro's action is premised, in part, upon her allegation that Medical Assurance's conduct was violative of West Virginia's Unfair Trade Practices Act. In *Jenkins v. J.C. Penny Casualty Ins. Co.*, 167 W.Va. 597, 280 S.E.2d 252 (1981) the West Virginia Supreme Court of Appeals determined that an implied private cause of action exists for an insurance company's violation of the unfair settlement practice provisions of *W.Va.Code*, 33-11-4(9). In so ruling, this court observed that *W.Va.Code*, 33-11-1 declares the general purpose of the act is to define and prohibit unfair insurance trade practices. In *Jenkins* the West Virginia Supreme Court of Appeals also found that the McCarran-Ferguson Act referenced in the West Virginia statute contains a general declaration that the regulation of insurance is a matter left to "the several states." *Jenkins* at 605 citing 15 U.S.C.A. § 1011 *et. seq.* In *Jenkins* the West Virginia Supreme Court of Appeals also expressly recognized the existence of a "strong policy declaration in our statute against unfair insurance practices;" and found that such policy supported a private cause of action for violation of the statute's unfair settlement practices provision.

Dr. Pizarro submits that the arbitration clause at issue in this case does not supersede or constitute a waiver and her right to bring judicial proceedings against an insurer alleged to have acted in contravention of West Virginia's Unfair Trade Practices Act. This is particularly true in a case where Medical Assurance has made no showing that Dr. Pizarro ever made a knowing and intelligent waiver of her constitutionally guaranteed access to the courts at the time the subject policy was issued.

Just as the arbitration clause in the employment contract in *Copley* was held not to defeat a human rights action filed by the claimant therein, the West Virginia circuit court correctly found that the arbitration clause contained in the instant insurance contract should not be permitted to defeat an insured's right to adjudicate a private cause of action for violation of the West Virginia Unfair Trade Practices Act.

While the West Virginia circuit court limited the terms of its order denying Medical Assurance's Motion to Dismiss to the question of whether Dr. Pizarro's claims fell within the purview of the arbitration clause and the question of whether the arbitration clause barred Dr. Pizarro's action under the West Virginia Unfair Practices Act, in determining the propriety of the circuit court's ruling, briefs before the West Virginia Supreme Court of Appeals included a discussion of other reasons providing an ample basis for the circuit court's jurisdiction over this action.

III. The Insurance Policy's Arbitration Provision May Not Be Enforced Under The Specific Circumstances Of This Case.

The Federal Arbitration Act ("FAA") provides that an arbitration provision is enforceable except "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In determining whether a valid arbitration agreement arose between the parties to a contract

courts must look to state law governing the formation of contracts. See: *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).

It is clear that generally applicable contract defenses, such as unconscionability, may be applied to arbitration agreements without contravening the FAA. See: *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 618, 686 (2000). Under this rule, as long as state law defenses concerning the validity, revocability, and enforceability of contracts are generally applicable to all contracts, and not limited to arbitration clauses, such defenses may be applied to invalidate arbitration agreements without offending the FAA. Therefore, it was Dr. Pizarro's contention before the West Virginia high court that her defense of unenforceable may properly be decided under state law.

This principle was recently upheld in *Ticknor v. Choice Hotels International, Inc.*, 265 F.3d 931 (9th Cir. 2001) where the court found that the FAA did not prevent an arbitration provision in a franchise agreement from being deemed to be unenforceable as unconscionable under Montana law. In a similar fashion, West Virginia defenses concerning the enforceability of the subject arbitration provision may be applied in this case.

In West Virginia the threshold question of arbitrability has been held to be a matter of contract to be determined by the court. *Century Aluminum of West Virginia, Inc. v. United Steel Workers of America*, 82 F.Supp.2d 580 (S.D. W.Va. 2000). In the same vein, the question of whether an arbitration provision was bargained for and valid is a matter of law for the court to determine. *State ex rel. Ranger Fuel Corp. v. Lilly*, 165 W.Va. 98, 267 S.E.2d 435 (1980). Courts must also decide issues pertaining to the legality of the underlying contract because such questions go to the very basis of an arbitrator's power. *Marrow Bone Development Co. v. District 17 United Mine Workers of America*, 147 F.3d 296 (C.A. 4, W.Va. 1998).

Therefore, in cases where a party alleges that an arbitration provision is unconscionable or that the contract was one of adhesion, the question of whether the arbitration provision was bargained for and valid is a question for the court to decide. In undertaking such determination court's in West Virginia must make reference to the entire contract, the nature of contracting parties, and the nature of the contract. *Art's Flower Shop, Inc. v. Chesapeake & Potomac Telephone Co. of West Virginia, Inc.*, 186 W.Va. 613, 413 S.E.2d 670 (1991).

"Unconscionability" is a principle of general contract law which is based in equity and deeply ingrained in West Virginia jurisprudence. In *Troy Mining Corp. v. Itmann Coal Co.*, 176 W.Va. 599, 346 S.E.2d 749 (1986) this Court was guided by the Restatement (2nd) of Contracts in defining the parameters of the defense of unconscionability:

> "a bargain is not unconscionable merely because the parties to it are unequal in bargaining position, or even because the inequality results in allocation of risks to the weaker party. But gross inadequatecy of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion or may show that the weaker party had no meaningful, or real alternative, or did not in fact assent or appear to assent to the unfair terms." *Troy* 176 W.Va. at 604, 346 S.E.2d at 753.

In *Board of Educ. of Berkeley Co. v. W. Harley Miller, Inc.*, 160 W.Va. 473, 236 S.E.2d 439 (1977) the West Virginia Supreme Court of Appeals discussed the defense of "unconscionability" in the context of an arbitration provision and held that:

> "...[W]here a party alleges that the arbitration provision was unconscionable, or was thrust upon him because he was unwaring and taken advantage of, or that the contract was one of adhesion, the question of whether an arbitration provision was bargained for and valid is a matter of law for the court to determine by reference to the entire contract, the nature of the contracting parties, and the nature of the undertakings covered by the contract." Id. at Syl. Pt. 3.

Hence a key issue on the question of whether an arbitration provision is unconscionable is whether it was "bargained for;" and the question of whether the provision was "bargained for" is a matter of law. *Miller* at 486-87.

In *Smithson v. U.S. Fidelity and Guar. Co.*, 186 W.Va. 195, 411 S.E.2d 850 (1991) an insurer asserted that an insured's bad faith action was barred because an underlying fire loss case was settled through arbitration. The insurer in *Smithson* argued that where a contract provides for mandatory arbitration, it precludes the parties from litigating the controversy in the courts. Medical Assurance advances the same argument here. While noting that the general rule regarding the enforcement of arbitration provisions in West Virginia is set forth in *Miller, supra,* the *Smithson* court was careful to highlight *Miller's* acknowledgment "that a contractual requirement of arbitration is not absolute and will not be enforced if there was disparate bargaining power, if there was an adhesion contract, or if the provision was unconscionable." *Smithson* at 201-02.

The *Smithson* court ultimately determined that the policy at issue did not provide for arbitration, but rather provided for an appraisal process. However, the decision has a bearing on the action *sub judice* to the extent that it

instructs that in determining the validity of an arbitration clause in an insurance contract, courts in West Virginia may consider the disparate bargaining power of the parties, the question of whether there was an adhesion contract and the issue of unconscionability.

In *Arnold v. United Companies Lending Corp.*, 204 W.Va. 229, 511 S.E.2d 854 (1998) the West Virginia Supreme Court of Appeals considered the question of whether an arbitration agreement entered into as part of a consumer loan transaction was unenforceable on the grounds that it was unconscionable, a contract of adhesion or in contravention of public policy. After applying the rule announced in *Art's Flower Shop, supra,* the *Arnold* court found that the arbitration agreement was "void for unconscionability" due, in part, to the "grossly unequal" position of the parties. *Arnold* at 861.

In applying the precepts of *Miller, Smithson* and *Arnold,* it is clear that under general principles of contract law in West Virginia, a court may find the arbitration provision at issue to be unenforceable. The question of disparate bargaining power cannot be debated. Dr. Pizarro was confronted by an insurer holding an oligopolistic position as one of but a few insurer's offering medical professional liability insurance in West Virginia. The bargaining positions of Dr. Pizarro and Medical Assurance were grossly unequal and the arbitration provision at issue was clearly not bargained for.

It is also clear that this case involves an adhesion contract. Indeed, the subject arbitration clause is contained within the quintessential contract of adhesion: an insurance policy. Thus, there was an ample basis for the court in West Virginia to conclude that the arbitration provision in this case was certainly not bargained for.

During the course of discovery in this action Dr. Pizarro requested Medical Assurance to produce all documents purporting to demonstrate any agreement by Evangeline C. Pizarro to waive her right to seek redress

against Medical Assurance in a West Virginia court of law for common law and statutory torts committed against her. In response, Medical Assurance produced a copy of the subject insurance policy along with policy applications and renewal questionnaires submitted by Dr. Pizarro. The Rule 36 admissions which followed the receipt of such discovery, however, demonstrated that none of the policy applications or renewal questionnaires contained any disclosure indicating that the professional liability policy to be issued as a result of such applications or questionnaires would contain a mandatory arbitration clause. Further, Medical Assurance has also admitted that the specific application submitted in connection with the policy at issue in this case did not contain any disclosure indicating that the insurance policy issued to Dr. Pizarro would contain a mandatory arbitration provision. Medical Assurance further admits that no letters, memoranda or other documents which were distributed to medical practitioners in West Virginia as explanatory or advertising material for medical professional liability policies disclosed that the insurance policies issued by Medical Assurance contained a provision requiring mandatory arbitration.

Evidence considered by the circuit court showed that the arbitration clause which Medical Assurance contends prevents the adjudication of this action was never even discussed with Dr. Pizarro prior to the issuance of the subject policy and was certainly not "bargained for" in any meaningful fashion. Indeed, evidence adduced in this matter made it clear that Dr. Pizarro was not even aware that her policy contained an arbitration clause until Medical Assurance raised the same as a bar to the instant action.

Despite Medical Assurance's refusal to admit that the subject insurance policy constitutes a contract of adhesion, it is clear that the policy is a "form contract" which bears all of the traditional earmarks of an adhesion contract. It is also clear that the parties' respective bargaining positions were grossly unequal and that the

arbitration provision in the subject insurance policy was never even disclosed to the insured, let alone bargained for.

Accordingly, in addition to the reasons discussed in the circuit court's decision denying Medical Assurance's Motion to Dismiss, the West Virginia Supreme Court of Appeals had an ample basis to deny Medical Assurance's Petition for a Writ of Prohibition based upon the conclusion that the arbitration provision contained in the subject insurance contract was unenforceable under general principles of contract law in West Virginia when applied to the specific circumstances of this case.

IV. The Federal Arbitration Act Does Not Apply To The Subject Medical Professional Liability Policy.

A. The Insurance Policy At Issue Does Not Evidence A Transaction Involving Interstate Commerce.

The Federal Arbitration Act applies only to maritime transactions or "a contract evidencing a transaction involving commerce." *Snyder v. Smith*, 736 F.2d 409, 417 (7th Cir. 1984); 9 U.S.C. § 2. Under the Act, "commerce" means "interstate commerce." Because there is no maritime transaction here, the application of the FAA requires an initial determination as to whether the insurance policy at issue evidences a transaction involving interstate commerce.

Although the requirement that an arbitration agreement evidence a transaction involving interstate commerce is to be construed broadly, it is clear that the rule of broad construction need not result in a finding that every agreement evidences a transaction involving interstate commerce. In determining whether a contract containing an arbitration provision evidences a transaction involving interstate commerce, courts are instructed look to the entire contract. Based on the discovery conducted below the following key facts are undisputed:

i) Medical Assurance of West Virginia, Inc. is a West Virginia corporation with its principal place of business located at 107 Capitol Street, Suite 200, Charleston, West Virginia.

ii) The designated policyholder of the subject policy is "Pizarro and Pizarro M.D.s" and that said policyholder's address is listed as 2115 Chapline Street, Suite 201, Wheeling, West Virginia.

iii) The agent which sold the subject policy was Berry, Bippus, Chison & Foose, with offices at 1117 Chapline Street, Wheeling, West Virginia.

iv) Medical Assurance of West Virginia, Inc. issued the subject policy to "Pizarro and Pizarro, M.D.s" by mailing a true copy thereof to 1115 Chapline Street, Suite 201, Wheeling, West Virginia.

v) The subject policy contains a West Virginia state law endorsement.

Based on these facts, it is apparent that the insurance policy at issue in this case does not evidence a transaction involving interstate commerce. Indeed, the only part of the policy which even mentions interstate commerce is the self-serving statement in the arbitration clause providing that the parties "acknowledge that this agreement evidences a transaction involving interstate commerce."

Despite the gratuitous language to the contrary, the fact remains that the insurance policy in this case was issued

by a West Virginia domestic insurance company to a West Virginia domestic business enterprise, was sold by a West Virginia sales agent, and covered physicians who reside in West Virginia. There is virtually no aspect of the subject medical professional liability policy which evidences that such policy involves interstate commerce.

Indeed, Medical Assurance has admitted that all policies of insurance issued to physicians in West Virginia in 1998 contained a mandatory arbitration provision, irrespective of the policyholder's proximity to the state border. Therefore, the same "acknowledgment" that the policy involves interstate commerce was inserted into policies issued to doctors with practices in the deep interior portions of this state where there would be not even an arguable involvement of interstate commerce. Medical Assurance's admission in this regard could not more clearly reveal that the purported "acknowledgment" which prefaces the arbitration provision in the subject insurance policy is little more than a subterfuge.

While Dr. Pizarro certainly acknowledges that her action against Medical Assurance involves a judgment entered against her in Ohio, the threshold question triggering the applicability of the FAA does not inquire into the basis of the parties' dispute. Instead, the inquiry is limited to whether "the contract" evidences a transaction involving interstate commerce. Because interstate commerce is a necessary basis for application of the FAA, and contacts or agreements not so predicated are to be governed by state law see: *Shearson Hayden Stone, Inc. v. Liang*, 493 F.Supp. 104 (N.D. Ill. 1980), the West Virginia court my properly find that the FAA is not applicable and that the arbitration provision is unenforceable under principles of state law.

Hence, in addition to the reasons set forth in the circuit court's opinion denying Medical Assurance's Motion to Dismiss, the high court in West Virginia had a sufficient factual record to determine that because the medical professional liability policy at issue in this case did not

evidence a transaction involving interstate commerce, the FAA did not control the subject arbitration provision.

B. The Federal Arbitration Act Is Reverse Preempted Under The McCarran-Ferguson Act.

In ruling upon Medical Assurance's Petition for Writ of Prohibition, the West Virginia Supreme Court of Appeals was also briefed by both sides on the issue of whether the application of the FAA in this matter was reversed pre-empted by the McCarran-Ferguson Act.

Congress enacted the McCarran-Ferguson Act, 15 U.S.C. 167; 1011, *et seq.*, for the specific purpose of consigning to the state broad and primary responsibility for regulating the insurance industry. See: *Sec. v. National Sec., Inc.*, 393 U.S. 453, 458 (1969); *Barnhardt Marine Ins., Inc. v. New England Int'l. Cer. Of Am., Inc.*, 961 F.2d 529, 531 (5th Cir. 1992). The McCarran-Ferguson Act, provides in pertinent part that:

> "...no Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance...unless such Act specifically relates to the business of insurance...." 15 U.S.C. 167; 1012(b).

Ordinarily, federal law pre-empts conflicting state law by virtue of the supremacy clause. See: *U.S. Const. Art. XI Cl. 2.* The McCarran-Ferguson Act, however, reverses the effect of the supremacy clause in a narrow range of cases involving state regulation of the insurance industry. By its terms, the McCarran-Ferguson Act permits a state law to reverse pre-empt a federal statute if (1) the federal statute does not specifically relate to the "business of insurance," (2) the state law was enacted for the "purpose of regulating the

business of insurance," and (3) the federal statute operates to "invalidate, impair, or supersede" the state law.

It is clear that the FAA does not relate specifically to the business of insurance. Hence, the first prong of reverse preemption is easily satisfied.

The category of laws enacted "for the purpose of regulating the business of insurance" is broad and consists of those laws "that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance." *United States Federal Depot v. Fabe*, 508 U.S. 491, 505 (1993) (quoting Black's Law Dictionary 1236, 1286 (6th E.D. 1990)). Further, statutes which focus upon protecting the relationship between the insurer and insured are deemed to be laws regulating the business of insurance. Id. at 501.

Under the McCarran-Ferguson Act, the West Virginia Unfair Trade Practices Act will reverse preempt the FAA if the West Virginia law is deemed to have been enacted "for the purpose of regulating the business of insurance." Hence, to support its position in this case, Medical Assurance argued that the West Virginia Unfair Trade Practices Act was not enacted for the purpose of regulating the business of insurance. In fashioning its argument on this point before the West Virginia Supreme Court of Appeals, Medical Assurance turned a blind eye to the language of the West Virginia statute and, instead, relied upon federal case law dealing with the interplay between ERISA's "preemption clause" (29 U.S.C. § 1144(a)) and ERISA's "savings clause" (29 U.S.C. § 1144(b)(2)(A)). Because, however, this action has nothing to do with an employee welfare benefit plan, Medical Assurance's evocation of ERISA in support of its preemption argument was woefully misplaced in its petition to the West Virginia high court.

Dr. Pizarro respectfully submits that rather than exploring the contours of the law of ERISA preemption, the West Virginia Supreme Court of Appeals needed only to

apply the clear language of the McCarran-Ferguson Act to the West Virginia Unfair Trade Practices Act to determine whether the latter reverse preempts the FAA in this case. Under the McCarran-Ferguson Act, the FAA "shall not be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the business of insurance...." 15 U.S.C. § 1012(b). Hence, the West Virginia Supreme Court of Appeals could well have boiled the reverse preemption issue down to the question of whether the West Virginia Unfair Trade Practices Act constitutes a law which was enacted by the West Virginia legislature "for the purpose of regulating the business of insurance."

The purpose of the West Virginia Unfair Trade Practices Act is not difficult to decipher as it is expressly stated at *W. Va. Code*, 33-11-1, entitled Declaration of Purpose:

> "...**the purpose of this article is to regulate trade practices in the business of insurance** in accordance with the intent of Congress as expressed in the act of Congress of March 9, 1945 (Public Law fifteen, seventy-ninth Congress), by defining or providing for the determination of, all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined." Id. (emphasis added)

Public Law 15, 79th Congress is codified at 15 U.S.C. §§ 1011 *et seq.* and is popularly known as the McCarran-Ferguson Act. Hence, the West Virginia Supreme Court of Appeals was certainly in a position to apply the clear and unambiguous language of the Unfair Trade Practices Act, and find that under its express terms it does indeed constitute a law enacted by a state for the purpose of

regulating the business of insurance such as to reverse preempt the FAA under the McCarran-Ferguson Act.

The doctrine of reverse preemption under the McCarran-Ferguson Act was recognized by the West Virginia Supreme Court of Appeals in *State ex rel. v. Blue Cross Blue Shield*, 203 W.Va. 690, 510 S.E.2d 764 (1998) where the provisions of *W.Va.Code*, 33-24-27 relating to an insurer's liquidation proceedings were found to be sufficiently geared to protect policyholders so that, under the McCarran-Ferguson Act, a state statute governing claim priority reverse pre-empted the federal priority statute found at 31 U.S.C. § 3713. See: *Blue Cross Blue Shield* at 712. Likewise, the Unfair Trade Practices Act is quite clearly intended to protect policyholders from the very type of unfair trade practice which is alleged in the amended complaint filed by Dr. Pizarro against Medical Assurance. Accordingly, the West Virginia Supreme Court of Appeals may have properly found that because the Unfair Trade Practices Act was enacted for the purpose of regulating the business of insurance that the second prong of the test for reverse preemption under McCarran-Ferguson Act is met in this case.

Finally, it is clear that the effect of applying the FAA to the insurance policy at issue would be to "invalidate, impair or supersede" the action which Dr. Pizarro has brought under the Unfair Trade Practices Act. Thus, the West Virginia Supreme Court of Appeals had a sound basis to find that the third prong of the test for reverse preemption under McCarran-Ferguson Act was certainly satisfied in this case.

Because (1) the FAA does not specifically relate to the "business of insurance," (2) the Unfair Trade Practices Act was enacted for the "purpose of regulating the business of insurance," and (3) the application of the FAA to the subject insurance policy would operate to "invalidate, impair or supersede" Dr. Pizarro's state law action, the West Virginia Supreme Court of Appeals had a sufficient basis to

conclude that the West Virginia Unfair Trade Practices Act, reverse preempts the FAA's application to the subject insurance policy under the McCarran-Ferguson Act.

CONCLUSION

Based on the foregoing, it is clear that the courts in West Virginia have not improperly refused to enforce a valid arbitration clause in this case. Indeed, the decision of the circuit court to allow Dr. Pizarro to go forward with her claims against Medical Assurance under law in West Virginia was in all ways proper and consistent with controlling federal and state law.

Further, the West Virginia Supreme Court of Appeals' refusal of Medical Assurance's Petition for a Writ of Prohibition does not demonstrate that the West Virginia court has decided any federal question in a manner that conflicts with federal law or the decisions of this Court. Instead, the West Virginia high court's refusal of Medical Assurance's petition only shows that Medical Assurance failed to establish that the circuit court abused its power and exceeded it legitimate authority in denying Medical Assurance's motion to dismiss. Because writs of prohibition are not granted under law in West Virginia where it does not clearly appear that the petitioner is entitled thereto, *Fisher v. Bouchelle*, 134 W.Va. 333, 61 S.E.2d 305 (1950); *Sidney C. Smith Corp. v. Dailey*, 136 W.Va. 380, 67 S.E.2d 523 (1950); and *State ex rel. Maynard v. Bronson*, 167 W.Va. 35, 277 S.E.2d 718 (1981), the West Virginia Supreme Court of Appeals properly found that prohibition did not lie. Accordingly, as there is no compelling reason to grant Medical Assurance's Petition for Writ of Certiorari, the same should be denied.

Respectfully submitted,
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IN THE CIRCUIT COURT OF OHIO COUNTY,
WEST VIRGINIA

EVANGELINE C. PIZARRO, M.D.	:
	:
Plaintiff,	:
	:
vs. Civil Action No. 00-C-1489(G)	
	:
MEDICAL ASSURANCE OF WEST VIRGINIA, INC., and COLOMBO & STUHR, PLLC	:
	:
Defendants.	:

Entered: May 13, 2002

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

This day came the parties, above-named, by their counsel for a hearing upon plaintiff's Motion for Partial Summary Judgment.

WHEREUPON, the Court considered the motion, memoranda filed in connection with said motion, argument of counsel and materials made of record in this matter including the pleadings and evidence before it and in accordance with the provisions of Rule 56(d) does accordingly find that the following material facts exist without substantial controversy:

(1) That the plaintiff, Evangeline C. Pizarro, M.D. is a named insured under a medical professional liability policy issued by the defendant, Medical Assurance of West Virginia, Inc. (hereinafter "Medical Assurance") which policy contains a limit of liability in the amount of $1,000,000.

(2) That on December 30, 1998, Delores and Ralph Young filed a medical malpractice action against Dr.

Pizarro and others in the Court of Common Pleas of Belmont County, Ohio (hereinafter "the underlying action").

(3) That the action against Dr. Pizarro was premised upon her alleged failure to diagnose Mrs. Young's rectal cancer which resulted in the development of multiple tumors in her rectum and an eventual surgery for the establishment of a permanent colostomy.

(4) That following the institution of the underlying action, Medical Assurance retained the services of the Morgantown, West Virginia law firm of Columbo and Stuhr, PLLC for purposes of representing the interests of Dr. Pizarro.

(5) That the underlying action against Dr. Pizarro proceeded to trial on August 22, 2000 and following four days of trial by jury, a verdict for compensatory damages totaling $7,500,000 was entered against Dr. Pizarro and the clinic.

(6) That the trial court gave the defendants credit for a $250,000 settlement made with another co-defendant prior to trial and entered a judgment in the amount of $7,250,000 against Dr. Pizarro and her co-defendant together with post-judgment interest at the rate of 10% per annum from August 25, 2000 until paid.

(7) That following the verdict, the trial court denied Dr. Pizarro's motion for new trial and all other substantive post-verdict motions filed on her behalf; while granting the co-defendant clinic's motion for a directed verdict on its cross claim for indemnification against Dr. Pizarro.

(8) That upon its determination that Dr. Pizarro's representatives failed to make a good faith effort to settle the case, the trial court in the underlying action granted the Young's motion for pre-judgment interest as provided for at O.R.C. 1343.03(C).

(9) That following the entry of the excess verdict, Dr. Pizarro retained Patrick S. Cassidy, Esq., Wray V.

Voegelin, Esq., and Cassidy, Myers, Cogan, Voegelin and Tennant, L.C. to represent her personal interests.

(10) That despite said counsels' request for Medical Assurance to indemnify Dr. Pizarro against any personal liability arising out of the excess judgment, Medical Assurance refused to indemnify Dr. Pizarro for any sum in excess of the one million dollars of coverage afforded under her professional liability policy.

(11) That following the entry of the judgment against Dr. Pizarro, Medical Assurance retained counsel on Dr. Pizarro's behalf to prosecute an appeal from such judgment; and said appeal is currently pending in the Court of Appeals of the 7th Appellate District in Ohio.

(12) That following Medical Assurance's refusal to indemnify Dr. Pizarro from any personal liability arising out of the excess judgment entered against her in the underlying action, Dr. Pizarro instituted the instant proceedings against Medical Assurance and the attorneys which it retained on her behalf.

(13) That in filing a *Shamblin* action under the circumstances of this case a plaintiff seeks to accomplish two goals: first, to be relieved of personal liability for the excess judgment which was rendered in the underlying action irrespective of liability limitation contained in the medical professional liability policy; and second, to obtain compensation for the other damages arising out of the alleged bad faith handling of the underlying action.

(14) That Medical Assurance failed to settle the underlying action within policy limits when there existed an opportunity to settle and when such settlement within policy limits would have released Dr. Pizarro from any and all personal liability

(15) That by correspondence under date of March 12, 2002 counsel for Medical Assurance advised counsel for Dr. Pizarro that Medical Assurance was willing to indemnify Dr. Pizarro for any and all damages or other

relief awarded against her with respect to the August 25, 2000 jury verdict entered in the underlying action.

(16) That based upon Medical Assurance's agreement to indemnify Dr. Pizarro, plaintiff has accomplished the objective of this litigation related to her request to be relieved of any personal liability for any judgment rendered against her in the underlying action irrespective of the liability limitation contained in her medical professional liability policy.

Based on the foregoing uncontested facts the Court doth

ORDER and ADJUDGE that plaintiff has prevailed with regard to her *Shamblin* action for bad faith against Medical Assurance designed to relieve her of any personal liability for any judgment ultimately rendered against her in the underlying action irrespective of the liability limitation contained in the subject medical professional liability policy.

WHEREUPON, the Court observed that Medical Assurance's aforesaid agreement to indemnify plaintiff does not permit this Court to fully adjudicate this action under Rule 56 as there remains material facts which are actually and in good faith controverted. Accordingly, pursuant to the provisions of Rule 56(f) the Court finds that at this point in the litigation process and at this stage of the discovery process genuine issues of material fact exist with regard to plaintiff's action against Medical Assurance:

1. Whether Medical Assurance's handling of the underlying action was violative of the West Virginia Unfair Trade Practices Act as provided for at *W.Va. Code*, 33-11-1 et. seq.

2. The amount of Dr. Pizarro's reasonable attorneys' fees in vindicating her *Shamblin* claim.

3. Whether Dr. Pizarro has sustained damages for net economic loss caused by Medical Assurance's bad

faith in the handling of the underlying action; and, if so, the amount of such damages.

4. Whether Dr. Pizarro has sustained damages for aggravation, inconvenience and emotional distress; and, if so, the amount of such damages.

5. Whether Medical Assurance's handling of the underlying action was accompanied by actual malice.

WHEREUPON, the Court observed that because plaintiff's motion for partial summary judgment applied only to her action against the defendant, Medical Assurance, this Order shall be limited to such action; and this Order is not intended to embrace any aspect of plaintiff's action against the defendant law firm.

Medical Assurance's objection and exception to the foregoing rulings of the Court shall be and are hereby saved.

Dated this 13th day of May, 2002.

/s/
Honorable Martin J. Gaughan, Judge

SEEN AND APPROVED BY:

/s/
Of Counsel for Plaintiff

/s/
Of Counsel for Medical Assurance of West Virginia, Inc.

/s/
Of Counsel for Colombo & Stuhr, PLLC